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**David C. Baum Memorial Lecture**

**\*1109** THE DAVID C. BAUM LECTURE: ABRAHAM LINCOLN AND THE AMERICAN UNION  
[\[FNd1\]](#)

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Amar

In his Baum Memorial Lecture on Civil Liberties and Civil Rights, Professor Amar pays tribute to one of Illinois's greatest contributions to constitutional liberty, in the person of Abraham Lincoln. In particular, Professor Amar explores Lincoln's multifaceted vision of Union and explains how that vision both protected liberty and reflected Lincoln's Illinois experience.

Here and now, let us turn our thoughts to Abraham Lincoln, to the American Union for which he lived and died, and to the vision of liberty that inspired his love of Union. To borrow a phrase from Lincoln himself, "it is altogether fitting and proper that we should do this" [\[FN1\]](#) in this place and at this hour.

For this place is truly the land of Lincoln. We meet near the geographic center of his adopted state of Illinois, at a great University bearing the state's name, and inside a graduate school devoted to the study of law, Lincoln's chosen profession. Here is what Lincoln said about this part of the world--specifically, about a city some miles west of this lecture hall--when he bade it farewell in early 1861:

No one, not in my situation, can appreciate my feeling of sadness at this parting. To this place, and the kindness of these people, I owe every thing. Here I have lived a quarter of a century, and have passed from a young to an old man. Here my children have been born, and one is buried. I now leave, not knowing when, or whether ever, I may return, with a task before me greater than that which rested upon [General] Washington . . . [\[FN2\]](#) \*1110 Return he did to central Illinois, but not in life. Here--to the heartland of his beloved Union--the funeral train brought his corpse in 1865. Here, in central Illinois, the remains of Abraham Lincoln reached their final resting place.

So much for this place, and its link to Lincoln. Now, a few words about this time, and its link to

liberty. Thanks to the generosity of the family and friends of the late Professor David C. Baum, this is an hour set aside for us to meditate upon our civil rights and civil liberties. The topic is vast, even daunting. Daunting, too, is the list of distinguished scholars who have preceded me at this podium; I am humbled to have been invited to join their number. The best way for us to handle so large a topic in a single hour, I suggest, is to whittle the thing down to size--to pick one aspect of civil liberty, and to elaborate it. The aspect that I propose we explore together is the concept of Union--in particular, Lincoln's vision of Union, and the implications of that vision for liberty. Even as thus narrowed, this remains a large and multifarious subject for a single lecture. But I shall count our time together well spent if, by the end of this hour, we can begin to see some of Lincoln's familiar texts in a clear light. In the process, I hope we can begin to appreciate just how important the concept of Union has been and still remains for our tradition of civil liberty.

### I. A Democratic Union

As Lincoln bid adieu to his Illinois neighbors in early 1861, he described the task that lay before him as "greater than that which rested upon Washington." That task, of course, was nothing less than the preservation of the Union. After Lincoln won election in November, 1860, and before he took office, several state governments purported to declare their independence from the Union and to form the Confederate States of America. The lame-duck President, James Buchanan, proclaimed state secession unconstitutional, but did little to stop or reverse it. Indeed, in his December 3, 1860, annual message to Congress, he declared himself constitutionally powerless to act unilaterally, and also argued that Congress lacked the lawful power "to make war against a State" or to "preserve [the Union] by force." [FN3] As emboldened secessionists stepped up their activities in the final days of the Buchanan Administration, all eyes turned to Lincoln. Would he simply allow the Union to \*1111 dissolve? What was his understanding of the Union, and of his role under it?

Lincoln's answer came in his March 4, 1861, Inaugural Address. His bottom line was strong and clear: the unilateral attempt of various states to leave the Union was utterly unconstitutional, and as President he was duty-bound to resist this attempt and to maintain the Union. [FN4] In his words:

[N]o State, upon its own mere motion, can lawfully get out of the Union, [and] resolves and ordinances to that effect are legally void . . . .

I therefore consider that, in view of the Constitution and the laws, the Union is unbroken; and, to the extent of my ability, I shall take care, as the Constitution itself expressly enjoins upon me, that the laws of the Union be faithfully executed in all the States. Doing this I deem to be only a simple duty on my part; and I shall perform it, so far as practicable, unless my rightful masters, the American people, shall withhold the requisite means, or, in some authoritative manner, direct the contrary. . . . [T]he Union . . . will constitutionally defend and maintain itself . . . .

. . . .

. . . The Chief Magistrate derives all his authority from the people, and they have conferred none upon him to fix the terms for the separation of the States. The people themselves can do this also if they choose; but the executive, as such, has nothing to do with it. His duty is to administer the present government, as it came to his hands, and to transmit it, unimpaired by him, to his successor. [FN5] In support of his emphatic conclusion that no state may leave the Union unilaterally--"upon its own mere

motion," in his words--Lincoln mustered a host of arguments. Let us now review them.

First, he argued that the Union must be perpetual as a matter of logic and first principles:

I hold, that in contemplation of universal law, and of the Constitution, the Union of these States is perpetual. Perpetuity is implied, if not expressed, in the fundamental law of all national governments. It is safe to assert that no government proper, ever had a provision in its organic law for its own termination. Continue to execute all the express provisions of our national Constitution, and the Union will endure forever--it being impossible to destroy it, except by some action not provided for in the instrument itself. [\[FN6\]](#)

But this claim--at least if read broadly and in isolation--proves too much. Must the Union be perpetual even if, say, every single American **\*1112** voter in 1861 preferred a peaceful and fair dissolution of the Union into two or more smaller governments? What if--more realistically--every state so agreed; or a regular Article V amendment so provided; or a large, deliberate, and geographically dispersed national majority so desired? To insist that the Union must be perpetual regardless of what the states and the people wanted would seem to threaten basic principles of federalism and democracy, principles that Lincoln himself eloquently affirmed in his Inaugural Address and on many other occasions. Indeed, in the very passages just recited we have heard Lincoln say that: (1) although the President has been given no authority to let a state to leave the Union unilaterally, "the people themselves can do this . . . if they choose;" and (2) although he as President would resist secession, his "rightful masters, the American People" might in some "authoritative manner" oblige him to change his course. Let us, then, turn to some of Lincoln's other arguments, for they bring us closer to his truest and best ideas about the Union.

Let's begin with Lincoln's clever response to the "compact theory" of the Union. According to most secessionists, the Union was a mere "compact" of preexisting and "sovereign" states. At the Founding, each of the thirteen states had voluntarily chosen to enter the Union--indeed, under Article VII of the Constitution, no state was obliged to ratify the Constitution merely because its sister states had done so: "The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the same." Thus, the Constitution went into effect only among the states that chose to ratify. According to many secessionists, each state was likewise free at any time and for any reason to unilaterally withdraw from the Union: "[A]s each [state] became parties [sic] to the Union by the vote of its own people assembled in convention, so any one of them may retire from the Union in a similar manner by the vote of such a convention." [\[FN7\]](#) But Lincoln's Inaugural Address countered as follows:

[I]f the United States be not a government proper, but an association of States in the nature of contract merely, can it, as a contract, be peaceably unmade, by less than all the parties who made it? One party to a contract may violate it--break it, so to speak; but does it not require all to lawfully rescind it? [\[FN8\]](#)

On this view, lawful secession would seem permissible only if every single state so agreed--just as Article V in effect provides that a state may secure an extra Senate seat only if every state agrees to this modification of the Philadelphia plan. [\[FN9\]](#)

**\*1113** The "unanimous state consent" theory of dis-Union neatly hoisted the compact theorists on their own petard; but did Lincoln really mean to affirm that a strong national majority might never peacefully dissolve the Union in some other way? Even if the state-compact theory of Union logically led to the conclusion that no state could leave without the consent of each and every other state, we must keep in

mind that Lincoln in fact rejected the compact theory as the proper account of the origins and nature of the federal Union. (I shall return to this point shortly.) And the idea of unanimity among states gave each state, however tiny, an extreme minority veto. But elsewhere in his Inaugural Address, Lincoln sang the virtues of majority rule:

If a minority, in such case [of good faith disagreements], will secede rather than acquiesce, they make a precedent which, in turn, will divide and ruin them; for a minority of their own will secede from them, whenever a majority refuses to be controlled by such minority. . . .

. . . .

Plainly, the central idea of secession, is the essence of anarchy. A majority, held in restraint by constitutional checks, and limitations, and always changing easily, with deliberate changes of popular opinions and sentiments, is the only true sovereign of a free people. Whoever rejects it, does, of necessity, fly to anarchy or to despotism. Unanimity is impossible; the rule of the minority, as a permanent arrangement, is wholly inadmissible; so that, rejecting the majority principle, anarchy, or despotism in some form, is all that is left. [\[FN10\]](#)

Again and again in his later public pronouncements, Lincoln would stress the ideas of majority rule and democracy. The issue of unilateral secession, Lincoln declared in his special session speech to Congress on July 4, 1861,

presents to the whole family of man, the question, whether a constitutional republic, or a democracy--a government of the people, by the same people-- can, or cannot, maintain its territorial integrity, against its own domestic foes. It presents the question, whether discontented individuals, too few in numbers to control administration, according to organic law, in any case, can always . . . break up their Government, and thus practically put an end to free government upon the earth . . . .

. . . .

**\*1114** . . . [Secessionists] are subtle, and profound, on the rights of minorities. They are not partial to that power which made the Constitution, and speaks from the preamble, calling itself "We, the People. . . ."

. . . .

. . . It is now for [our people] to demonstrate to the world, that those who can fairly carry an election, can also suppress a rebellion--that ballots are the rightful, and peaceful, successors of bullets; and that when ballots have fairly, and constitutionally, decided, there can be no successful appeal, back to bullets; that there can be no successful appeal, except to ballots themselves, at succeeding elections. Such will be a great lesson of peace; teaching men that what they cannot take by an election, neither can they take it by a war . . . . [\[FN11\]](#)

If a secessionist minority could simply disregard elections and unilaterally quit whenever it felt disgruntled, then democratic self-government would be at an end. The secessionists' claim to an extreme minority veto was nothing less than an assault on the idea of democracy itself--"government of the people, by the people, for the people." [\[FN12\]](#)

If Lincoln's rejection of unilateral secession ultimately rested on principles of popular self-government and national majority rule, then how, exactly, might a national popular majority that favored secession effect its will? Lincoln did not address the question at length, but several possibilities are worth pondering. For starters, perhaps an amendment pursuant to Article V of the Constitution might have authorized secession, and specified its terms--preserving Northern rights of navigation down the Mississippi River, providing for an equitable apportionment of the preexisting national debt, specifying

respective territorial rights in the American West, and so on. Of course, to succeed, such an amendment would have required support from the North as well as the South, thereby reflecting the deliberate judgment of the whole nation, and not merely the will or whim of a churlish part. This idea was central to Lincoln's First Inaugural, which urged secessionists to submit to "the judgment of this great tribunal, the American people" encompassing both "the North" and "the South." [\[FN13\]](#) An Article V amendment would also harmonize with Lincoln's specific language to the effect that "the people themselves" could choose to "fix the terms for the separation of the \*1115 States" but that "the executive, as such, has nothing to do with" any of this. Federal constitutional amendments are often described as actions of "the people themselves" as opposed to actions of ordinary government (even though such amendments typically are adopted by supermajorities of ordinary state and federal legislatures); and under the rules of Article V, the President does indeed have no formal role to play.

Given Lincoln's overall political theory of popular self-government, he might also have envisioned a nonbinding national referendum. In early January, 1861, Kentucky Senator John J. Crittenden had proposed a compromise constitutional amendment to preserve the Union, and called for a national referendum on his compromise package. [\[FN14\]](#) Granted, the Constitution's Article V does not explicitly provide for any such national referendum. But even if such a vote were not legally binding, in a regime based on the people's ultimate sovereignty, the results of such a national referendum would likely carry great moral weight with those government actors--Congress and state legislatures--ordinarily involved in the amendment process. [\[FN15\]](#) Analogously, prior to the adoption of the Seventeenth Amendment, the electorate had no formal role to play in directly electing senators under the Constitution as written; but many states evolved informal systems in which voters would express their views in "beauty contest" votes that state legislatures felt politically (even if not legally) obliged to honor. [\[FN16\]](#)

Conceivably, both Article V amendments and national referenda might have aimed to authorize a wholly lawful and peaceful secession, *ex ante*; other possibilities come into view when we recall that by the time of Lincoln's Inaugural, powerful forces in one section of the country had already unilaterally attempted secession, gained control of the machinery of ordinary government, and presented their fait accompli to the nation. The proper constitutional response of the federal government should probably depend on how the confederates managed to come to power. If \*1116 they won control by toppling duly elected state governments merely by force of arms, the federal government would seem to be obliged to resist and if possible undo this antidemocratic coup d'etat--that is one of the central meanings of the Article IV, section 4 clause under which the United States promises to guarantee to each state a Republican Form of Government. At least this was Lincoln's view; indeed, he explicitly invoked the Article IV Guarantee Clause in support of his Unionism, [\[FN17\]](#) and he condemned Southern secession not merely as undemocratic at the national level, (because it defied the sentiments of Northern voters) but also as undemocratic at the state level (because it had been triggered by improper, unfair, and coercive votes, at best). As he explained to Congress on July 4, 1861:

It may well be questioned whether there is, to-day, a majority of the legally qualified voters of any State, except, perhaps South Carolina, in favor of disunion. There is much reason to believe that the Union men are the majority in many, if not in every other one, of the so-called seceded States. The contrary has not been demonstrated in any one of them. [\[FN18\]](#)

But even in the case of a wildly undemocratic coup, political imperatives might at some point require the national government, acting on behalf of the national people, to acquiesce; and the Constitution

includes mechanisms for implementing this acquiescence. If foreign governments--Britain, France, Mexico--were to recognize Confederacy as both the de facto and de jure government of the Southern states, then couldn't the federal government properly make treaties with these foreign governments conceding that these states were no longer part of the Union? If the United States could, by treaty, acquire Louisiana from France, or cede disputed parts of Maine to British Canada, [\[FN19\]](#) couldn't it likewise make treaties with France and Britain recognizing that it had lost control over, say, South Carolina? If America could win part of Texas by force of arms--and cement this victory with a treaty with Mexico--couldn't it likewise lose all of Texas by force of arms, and acknowledge this defeat \*1117 with a comparable treaty with Mexico? Once these treaties with third-party nations were concluded, surely there would remain no constitutional obstacle to entering into treaties with the Confederacy itself, now fully recognized as a foreign government.

So much for secessionist coups that are unrepugnant at the state level. Suppose instead--counterfactually, according to Lincoln--that Confederate secessionists represented the views of a strong and deliberate majority of the voters of their respective states, as properly expressed in duly convened special state referenda and state conventions. [\[FN20\]](#) On these assumptions, the Republican Guarantee Clause fades into the background: its words would not oblige the federal government to intervene. To be sure, Lincoln explained why the national government and the national people were not required to acquiesce in the South's unilateral action--but could they not choose to acquiesce? If a national majority preferred to let the South go, couldn't Congress pass a statute ceding the Southern states, just as Congress in 1845 had passed a statute acquiring a Southern state (namely, Texas)? Note that any objections based on the letter or spirit of Article IV's special guarantees of state territorial integrity [\[FN21\]](#) would seem to be met if the peoples and governments of the confederate states truly did support disunion.

Thus far, we have considered several possible mechanisms by which Lincoln's "rightful masters"--the American people as a whole, North and South, East and West--might have permitted disunion: via constitutional amendments, nonbinding national referenda, treaties, and congressional statutes. It remains to consider one more national mechanism that Lincoln apparently had in mind: if the American people truly wanted secession, they would be free to vote for an openly secessionist President in 1864. This was a not-so-subtle refrain throughout his First Inaugural. Early on, he pointedly referred to his "brief constitutional term of four years." [\[FN22\]](#) And one obvious way in which his "rightful masters, the American people" could in "an authoritative manner" "withhold" from him the "requisite means" of resisting dis-Union would be to oust him from the White House in 1864. Near the end of his Address, he called upon fellow citizens to show "patient confidence in the ultimate justice of the people" [\[FN23\]](#) and explained that the American people

have wisely given their public servants but little power for mischief; and have, with equal wisdom, provided for the return of that little to their own hands at very short intervals. While the people retain their virtue, and vigilance, no administration, by any extreme of \*1118 wickedness or folly, can very seriously injure the government, in the short space of four years. [\[FN24\]](#)

Consider also the following suggestive language from the closing paragraphs of Lincoln's July 4, 1861, Special Session Address to Congress:

[W]hen ballots have fairly, and constitutionally, decided, there can be no successful appeal, back to bullets; . . . there can be no successful appeal, except to ballots themselves, at succeeding elections . . .

....

. . . [N]o popular government can long survive a marked precedent, that those who carry an election, can only save the government from immediate destruction, by giving up the main point, upon which the people gave the election. The people themselves, and not their servants, can safely reverse their own deliberate decisions. [\[FN25\]](#)

In this regard it is supremely noteworthy (but rarely noticed by those who accuse Lincoln of acting like a dictator) that in 1864, in the middle of an all-out Civil War, Lincoln allowed a regular presidential election to proceed, and pledged to abide by its outcome--even though electoral victory for his opponent might well have led to compromise with the Confederacy and a negotiated dissolution of the Union that Lincoln loved. [\[FN26\]](#) Like Washington's decision in 1792-93 to walk away from power after two terms, and Adams's decision in 1800-01 to accept the people's verdict and yield the presidency to his bitterest political foe, Lincoln's decision in 1864 to submit himself and his platform to the judgment of the supreme tribunal of the American people deserves our highest praise. At the time, each of these three examples of republican self-denial was virtually unprecedented in human history. Together, these three examples have given the rest of the world a stunning illustration of the true meaning of constitutional democracy-- government of, by, and for the people. [\[FN27\]](#)

**\*1119** The importance of the election of 1864 also invites us to look more closely at the election of 1860 that brought Lincoln to power. It's worth noting that although Lincoln won the Presidency with an absolute majority of electoral votes, and a decisive plurality of popular votes, sixty percent of American voters in the fractured election of 1860 had voted against him (or more precisely, for someone else). [\[FN28\]](#) Lincoln's legal right to the Presidency was unassailable, but his popular "mandate"--to use a modern phrase--was weak. On the other hand, Lincoln's election was the result of a process far more national and surely more fair than the unilateral state secession votes that followed. And Lincoln himself plainly understood that legal rules--like the rules of the electoral college--helped define who could properly vote and how those votes should be properly aggregated. Moreover, it would have been democratically awkward to have awarded the Presidency to anyone else, given that Lincoln had won many more popular votes than any of his three opponents. (Parenthetically, in the famous Lincoln-Douglas debates in this state in 1858, Lincoln's party in fact received more statewide votes than Douglas's party for the state legislature; but because of gerrymandering, other voting quirks, and the fact that not all state legislative seats were open in the 1858 election, Douglas won the "legal" vote for U.S. Senate in the state legislature even though Lincoln in effect won the "popular" vote.) [\[FN29\]](#)

It's also worth noting that Lincoln's argument that as President he could make little mischief on his own apparently did not persuade Southern secessionists. Why? If Lincoln's election was arguably a fluke--the result of the failure of the Democratic Party to coalesce around a single candidate [\[FN30\]](#)--why didn't the South simply show the patience Lincoln called for, wait four short years, regroup, and then send the man packing? After all, Southern interests had largely dominated presidential politics since the Founding--Virginian slaveholders had held the Presidency for thirty-two of its first thirty-six years, and most recent presidents had either been Southern apologists for slavery or "Northern men of Southern [pro-slavery] sympathies" like Franklin Pierce and James Buchanan. Largely as a result of this presidential pattern, the Supreme **\*1120** Court in 1861 was firmly pro-South and pro-slavery; and Southerners also had enough votes in the House and Senate to block many of the laws Lincoln might have pushed for. Why were pro-slavery Southerners so threatened by Lincoln?

One answer is that Lincoln acting alone could do something that the Slave Power viewed with dread.

Wielding considerable patronage power over the post office, Lincoln could make local postal appointments in the South that could help establish the Republican Party as a genuine and credible political force in that region. He could also allow antislavery literature to circulate through the federal mails. Southern governments and Lincoln's pro-slavery predecessors in the White House had virtually closed off the mails to abolitionist pamphlets during the previous quarter century, but Lincoln could single-handedly pry the South open to free speech. In 1860, the Republican Party was virtually outlawed in many Southern states; it was literally a crime to criticize slavery. Through the post office, Lincoln might begin to change all that; and the Slave Power viewed a truly free press and a genuinely open political process as an intolerable threat. Northerners who had tried to venture down South to speak against slavery had been viciously punished; and Lincoln was openly siding with the forces of free speech. On his view of Union, citizens of one state should be free to engage in political and religious discourse in sister states; and no state should be allowed to muzzle conversation about great national issues--such as whether slavery was moral and whether it should be expanded. [\[FN31\]](#)

## II. A Constitutional Union

As we have seen, Lincoln argued that the essence of secession was anarchy. If South Carolina could lawfully choose to secede from the Union in 1860, why couldn't she lawfully choose to secede from the Confederacy in 1861? Why couldn't Charleston lawfully choose to secede from South Carolina in 1862, or a neighborhood lawfully choose to secede \*1121 from Charleston in 1863? The response of secessionists like Jefferson Davis was that Lincoln was right to emphasize majority rule, but wrong to emphasize a national majority rather than a state majority. Within a well-ordered democratic polity, the majority did properly bind the minority; thus (on Davis's view) the minority of South Carolinians who preferred the Union were properly bound by the majority that preferred secession in a duly convened state election. Charleston had no lawful right to unilaterally secede from South Carolina, because the state was the proper juridical entity over which to tally votes. In other words, under the Constitution, the state was the relevant "sovereign"--and not Charleston on the one hand, or the Union on the other. Or so Confederates like Davis argued. [\[FN32\]](#)

In response, Lincoln countered that the Constitution privileged the Union over South Carolina, or any other state acting unilaterally. As we shall see, Lincoln was clearly right to hold this view, but perhaps wrong in some of his specific (and unnecessary) claims on behalf of it.

In his First Inaugural, Lincoln insisted that the Union preceded the states, logically and chronologically, [\[FN33\]](#) and he elaborated these points at length in his July 4, 1861, Special Session Address to Congress:

This sophism [i.e., the claimed right of unilateral secession] derives . . . its currency from the assumption, that there is some omnipotent, and sacred supremacy, pertaining to a State--to each State of our Federal Union. Our States have neither more, nor less power, than that reserved to them, in the Union, by the Constitution--no one of them ever having been a State out of the Union. The original ones passed into the Union even before they cast off their British colonial dependence; and the new ones each came into the Union directly from a condition of dependence, excepting Texas. And even Texas, in its temporary independence, was never designated a State . . . Having never been States, either in substance, or in name, outside of the Union, whence this magical omnipotence of "State rights," asserting a claim of power to lawfully destroy the Union itself? Much is said about the "sovereignty" of

the States; but the word, even, is not in the national Constitution . . . . [N]o one of our States, except Texas, ever was a sovereignty. And even Texas gave up the character on coming into the Union; by which act, she acknowledged the Constitution of the United States, and the laws and treaties of the United States made in pursuance of the Constitution, to be, for her, the supreme law of the land. The States have their status in the Union, and they have no other legal status. If they break from this, they can only do so against law, and by revolution. The Union, and not themselves separately, procured their independence, and their \*1122 liberty. By conquest, or purchase, the Union gave each of them, whatever of independence, and liberty, it has. The Union is older than any of the States; and, in fact, it created them as States. Originally, some dependent colonies made the Union; and, in turn, the Union threw off their old dependence, for them, and made them States, such as they are. Not one of them ever had a State constitution, independent of the Union. [\[FN34\]](#)

This is a lot to take in, and some of it is hard to swallow. Here is an alternative narrative, that men like Robert E. Lee found compelling:

British North America was founded and populated in the seventeenth century not as a single continental juridical entity--"America"--but as an assortment of distinct legal regimes, each with its own name, its own unique legal charter, its own separate laws and legal institutions. As late as 1760, "Virginia" was, legally speaking, an obvious fait accompli--its House of Burgesses had been meeting continuously since the 1620s--but "the Union" as a legal entity was still waiting to be born. The British colonies were linked together by a common King, but not directly to each other. (A twentieth-century analogue might be the hub-and-spoke British Commonwealth circa 1935, encompassing India, New Zealand, Australia, Kenya, and so on.) No one in 1760 could foresee that in 1800, Georgia would be "united" with Massachusetts, but not with, say, the West Indies or Canada. When thirteen specific colonies began to coordinate their resistance to British policies, they did so as separate legal regimes, bound together in a kind of international assembly--hence the name, "Continental Congress" (like the international "Congress" of Vienna in 1815) rather than "the American legislature." In 1776, these colonies declared themselves independent as "United States"--united, in a kind of league, but distinct and independent states, nonetheless. Each state adopted its own constitution--and these separate constitutions were dramatic emblems of the independence and sovereignty of each state. The colonies' joint declaration of independence proclaimed themselves "free and independent states"--independent even of each other save as they chose, for sound military and prudential reasons, to concert their actions. They were allies, not a nation. (This was Jefferson's view of the document he penned--and "the United States" are plainly a plural noun in his Declaration.) Had 1776 been widely understood as a moment when Virginia somehow merged into some larger sovereign "Union" there would have been considerable conversation about this--especially given the conventional wisdom in 1776 that democracy could thrive only in a geographically small jurisdiction with a relatively homogenous population shaped by a common climate and a common culture. Yet no deep and sustained conversations of this sort are evident in 1776 to warrant so dramatic a \*1123 change in Virginia's deeply rooted identity. (To rename her "colonial" House of Burgesses a "state" House of Burgesses involved no great shift of identity or institutional practice; to say that Virginians should henceforth be coercively governed by a newfangled "Union" dominated by non-Virginians was an altogether different thing.) When the time came to legally specify the precise nature of the American alliance, the Articles of Confederation explicitly and emphatically proclaimed that each state was indeed "sovereign" and that the "Union" was simply a kind of treaty--a "firm league of friendship," a mere "confederation" of otherwise autonomous states. The 1783 treaty of peace with Great Britain is likewise best read as affirming the separate sovereignty of each state. And most dramatically of all, the Constitution itself emphatically recognized the separate

sovereignty of each state circa September, 1787. Thus, Article VII specified that each state was free to go its own way--no state would be bound by the Constitution unless that state chose to ratify it, regardless of what its allies in the "Union" chose to do. Indeed, when George Washington was elected President in 1789, two of the original thirteen colonies were acting as independent nations outside the Union--both North Carolina and Rhode Island declined to ratify the Constitution at first, and agreed to join the document only well after it had already gone into operation in the other states. [\[FN35\]](#)

I do not insist that this is the only way to understand the preconstitutional history of America, but if I were forced to choose between this narrative and Lincoln's, I would choose this one.

Does this mean that unilateral secession was, in the final analysis, constitutional, or that Lincoln was wrong to resist it? Not at all. For the real question is not what was the status of states before they joined the Constitution, but what was the status of states after they joined.

As Lincoln himself explained in passing, the fact that Texas was sovereign in 1841 does not mean that she remained sovereign in 1861. In the interim she joined a Constitution whose Article VI supremacy clause--which Lincoln astutely invoked--clearly resolves the secession question, though without using the word "secession." Article VI says that whenever the federal Constitution conflicts with a state constitution, the federal Constitution always prevails. [\[FN36\]](#) Thus, even if the people of Texas meet in a state convention in 1861 and try to redraft the basic ground rules (the constitution) of Texas, they may not do anything that violates the larger national Constitution--or at least they may not do so **\*1124** unilaterally. And here is where the neighboring clauses surrounding Article VI come in. In dramatic contrast to Article VII--whose unanimity rule that no state can bind another confirms the sovereignty of each state prior to 1787 [\[FN37\]](#)--Article V does not permit a single state convention to modify the federal Constitution for itself. Moreover, it makes clear that a state may be bound by a federal constitutional amendment even if that state votes against the amendment in a properly convened state convention. [\[FN38\]](#) And this rule is flatly inconsistent with the idea that states remain sovereign after joining the Constitution, even if they were sovereign before joining it.

Thus, ratification of the Constitution itself marked the moment when previously sovereign states gave up their sovereignty and legal independence. During ratification, there was indeed a broad and deep debate about whether such a dramatic change in Virginia's (and her respective sister states') identity was warranted; and about whether such a change could be harmonized with conventional political science as exemplified by the celebrated Montesquieu. Nor was the document opaque about the fundamental issue of future secession. Its Preamble proudly proclaimed its literally primary purpose to be the formation of a "more perfect union." The phrase "perfect union" had a special resonance and a precise meaning in 1787: it was a pointed reference to the famous 1707 Act of Union between Scotland and England, an Act to form, in the words of Queen Anne, an "entire and perfect union." [\[FN39\]](#) This Act was plainly understood to preclude unilateral Scottish secession, and was so explained by Blackstone's famous Commentaries, which were widely read in America. [\[FN40\]](#) The Federalist No. 5 explicitly invoked the Act of 1707 and its "perfect union" backdrop as the template for the proposed Constitution, [\[FN41\]](#) and The Federalist No. 11 went on to defend the idea that the "thirteen states" should be "bound together in a strict and indissoluble Union." [\[FN42\]](#) Similarly, James Wilson insisted at the Pennsylvania ratifying convention that "the bonds of our union ought therefore to be indissolubly strong" [\[FN43\]](#) and James Madison wrote to Alexander Hamilton that a state's ratification must be "in toto, and for ever." [\[FN44\]](#)

**\*1125** In his First Inaugural, Lincoln himself invoked the "perfect union" language with pointed emphasis: "[I]n 1787, one of the declared objects for ordaining and establishing the Constitution, was 'to form a more perfect union.'" [\[FN45\]](#) Clearly, Lincoln insisted, these words meant that a state could not ratify in 1788 and later unilaterally secede "upon its own mere motion." And if we insist on still more historical support for this view--if we yearn for some kind of smoking gun against the claimed right of unilateral secession--we will find it in a rather unlikely source. In his otherwise pusillanimous Address to Congress in December, 1860, President James Buchanan in one brief passage hit the historical nail on the head:

In that mighty struggle [between Federalists and Antifederalists over the ratification of the Constitution] it never occurred to any individual, either among its opponents or advocates, to assert or even to intimate that their efforts were all vain labor, because the moment that any State felt herself aggrieved she might secede from the Union. What a crushing argument would this have proved against those who dreaded that the rights of States would be endangered by the Constitution! The truth is that it was not until many years after the origin of the Federal Government that such a proposition was first advanced. [\[FN46\]](#)

Indeed, we shall soon encounter in more detail the 1787 Federalists' chief functional argument for their proposed "more perfect union"--an argument that I have elsewhere labeled a "geostrategic" argument. [\[FN47\]](#) As we shall see momentarily, this geostrategic argument plainly presupposed the unavailability of unilateral secession. Once in the more perfect union, no disgruntled state could unilaterally withdraw its unique land mass without winning the approval of fellow Unionists in adjoining states. Within the secure continental union, weapons and fortifications pointed out at enemies, and must never be allowed to be unilaterally swiveled against fellow Americans.

Though I have suggested that Lincoln's precise historical narrative was problematic, it is nonetheless illuminating to try to understand why he said what he did. I suggest that his view of the Union was powerfully shaped by this place--Illinois. Consider how the world looked to a man like Robert E. Lee in 1861. As a proud son of Virginia, whose forebears had played leading roles in Virginia politics and its House of Burgesses for two centuries, Lee was a Virginian first. [\[FN48\]](#) Of course Virginia preceded **\*1126** America--who could ever think otherwise? Consider now how the world looked to a typical (white, propertied, slaveholding male) Texan in 1861. It was absurd to say that the Union came before the states; Texas proved otherwise! (Texans are usually quite good at seeing the importance of Texas; the problem is getting them to see the importance of anything else.) But now consider how the world looked to a man like Lincoln in 1861. His forbears came from several states--Kentucky, Virginia, Pennsylvania, and possibly New England as well, though Lincoln was not quite sure. [\[FN49\]](#) He himself had lived in three states--born in Kentucky, moving to Indiana at age seven, and then on to Illinois as a young man. He and his family were first and foremost not Virginians, or Pennsylvanians, or New Englanders, or Kentuckians or Hoosiers or even Illinoisans; they were Americans. And to him, it seemed natural that the Union did indeed come first logically and chronologically. The lands that became the states of Indiana and Illinois were federal territories first, administered by the federal government prior to statehood. Indeed, Lincoln's family reached Indiana just at the point the region was completing its transition from territory to state. Even more dramatic, the lands that would one day become Illinois and Indiana were part of the "Union" even before the Constitution was adopted--part of the Old Northwest Territory that was administered by continental officials (the Congress under the Articles of Confederation) years before the Constitution came along. When we remember where Lincoln was quite literally coming from, it is easier to understand (whether or not we ultimately

endorse) his repeated insistence that "[t]he Union is much older than the Constitution" [FN50] and that "[t]he Union is older than any of the States; and, in fact, it created them as States." [FN51] To a plainsman reared in the old Northwest, this rang true, even as it grated on the ears of many Virginians and Texans.

### III. A Geographic Union

This was not the only way that geography--and in particular, the geography of the Midwest--shaped Lincoln's view of Union. But before we confront Lincoln's view of geography and Union, let's consider the Founders' view.

Geography preoccupied the Founders. Classical political theory had suggested that democracies could not extend over large geographic areas; and the entire first section of *The Federalist* devoted itself to refuting this argument against a "more perfect union" aiming to span a continent. Today, we are most familiar with Madison's argument for Union in \*1127 *The Federalist* No. 10: a strong Union would protect Americans from majority tyranny at the state level. But this argument came rather late in *The Federalist*, and persuaded few skeptics: the Virginia House of Burgesses had been up and running for more than 150 years, and it was outlandish to think that Virginians needed a special continental regime--the likes of which had never before been seen in human history--to protect themselves from their fellow Virginians. Today, we celebrate this *Federalist* Paper because it helps make sense of our post-Civil War, post-Fourteenth Amendment, post- *Brown v. Board* world; but as Douglass Adair has proved, almost no one noticed the Tenth *Federalist* before the 20th century. [FN52]

Instead Publius's key argument for Union came well before Number 10, and stressed the need for a strong continental union not to protect Virginians from their own state, but to protect them from other states, and vice versa. Ruthlessly compressed, the geostrategic argument went something like this:

Rampant despotism reigns over almost all of the European continent in 1787, yet England is relatively free because of her unique geography. As an island, she is protected from the military depredations of her neighbors by the English Channel. So long as Britannia maintains a strong navy and rules the waves (remember 1588!), she need not overly concern herself with the horrible prospect of invasion. Navies, moreover, are relatively defensive creatures that cannot easily be turned upon Englishmen to impose domestic tyranny. Large standing armies are another story--the story of tyranny. Yet regimes on the continent of Europe may well require such armies to defend land borders against invasion. Tragically, land borders often lead to a race to the bottom in which a single ambitious regime arming itself for military adventurism forces each of its neighbors to build up its army to deter and (if necessary) repel invasion.

But armies beget strong executives to lead them, and the combination begets domestic tyranny. Unlike navies, armies can easily be used not just to thwart invaders, but to crush domestic liberty. The task for Americans, then, is to structure our affairs to avoid the general fate of the European Continent, as the English have done with a God-given moat (the Channel) and the Swiss with a God-given rampart (the Great Wall of the Alps).

The existing Articles of Confederation have proved utterly unworkable; the existing confederation is de facto dissolved. Suppose we were to replace the Confederation with thirteen separate nations, each with land borders with its neighbors, free to arm itself without limit. Each nation-state would undoubtedly raise an army, ostensibly to protect itself against Indians or British, French, or Spanish

outposts, but also to intimidate its neighbors. We would \*1128 then recreate continental Europe and the near-universal tyranny that characterizes that continent. To opt instead for a system of three or four smaller confederacies (perhaps a Northern, a Southern, and one or two mid-Atlantic leagues) would not be much better, especially given the tremendous conflict that will predictably arise concerning control of the West. If, however, an unum can be forged from pluribus, America will resemble England. The three-thousand-mile wide Atlantic ocean will be America's moat, for it will protect her against replication of, and subjugation by, the militarism of the European Continental powers. We can rely primarily on a modestly sized navy.

To be sure, the new nation might require a very small army to fortify the South and West against Indians, and the North against Canada, but none of these land-bordering regimes can truly threaten the united states, or provide the president a pretext to create a dangerously large standing army. Unless, of course, one of the land-bordering regimes received strong support from the Old Powers in Europe, whom Americans must discourage from strengthening their footholds in the New World. And once again, united states would be more likely to discourage European adventurism, disabling the Old Powers from playing state off against state in classic divide-and-conquer fashion. [\[FN53\]](#)

This Founding vision helps explain many of the Constitution's specific words--its rules about state troops in Article I, section 10; [\[FN54\]](#) its special skepticism of federal standing armies in Article I, section 8 and in the Second and Third Amendments; [\[FN55\]](#) its specific language of the Constitution as the law of "the land" in Article VI [\[FN56\]](#)--and much of its overall structure. It also helps explain much of the next seventy years of American history--what Washington meant in important parts of his Farewell Address, why Jefferson violated his own rules of construction to buy Louisiana from France, and how later Presidents proclaimed the "Monroe Doctrine" and practiced "Manifest Destiny." [\[FN57\]](#)

With this background, listen to the following passage from Lincoln's First Inaugural, a passage that he repeated verbatim in his Second Annual Message to Congress in December, 1862:

Physically speaking, we cannot separate. We cannot remove our respective sections from each other, nor build an impassable wall \*1129 between them. A husband and wife may be divorced, and go out of the presence, and beyond the reach of each other; but the different parts of our country cannot do this. They cannot but remain face to face; and intercourse, either amicable or hostile, must continue between them. Is it possible then to make that intercourse more advantageous, or more satisfactory, after separation than before? Can aliens make treaties easier than friends can make laws? Can treaties be more faithfully enforced between aliens, than laws can among friends? [\[FN58\]](#)

Listen, too, to Lincoln's further geographic musings in his Second Annual Message:

A nation may be said to consist of its territory, its people, and its laws. The territory is the only part which is of certain durability. "One generation passeth away, and another generation cometh, but the earth abideth forever." It is of the first importance to duly consider, and estimate, this ever-enduring part. That portion of the earth's surface which is owned and inhabited by the people of the United States, is well adapted to be the home of one national family; and it is not well adapted for two, or more

....

There is no line, straight or crooked, suitable for a national boundary, upon which to divide . . . .

But there is another difficulty. The great interior region, bounded east by the Alleghanies, north by the British dominions, west by the Rocky mountains, and south by the line along which the culture of corn and cotton meets, and which includes part of Virginia, part of Tennessee, all of Kentucky, Ohio, Indiana, Michigan, Wisconsin, Illinois, Missouri, Kansas, Iowa, Minnesota and the Territories of

Dakota, Nebraska, and part of Colorado, already has above ten millions of people, and will have fifty millions within fifty years, if not prevented by any political folly or mistake. It contains more than one-third of the country owned by the United States--certainly more than one million of square miles . . . . In the production of provisions, grains, grasses, and all which proceed from them, this great interior region is naturally one of the most important in the world . . . [a]nd yet this region has no sea-coast, touches no ocean anywhere. As part of one nation, its people now find, and may forever find, their way to Europe by New York, to South America and Africa by New Orleans, and to Asia by San Francisco. But separate our common country into two nations, as designed by the present rebellion, and every man of this great interior region is thereby cut off from some one or more of these outlets, not, perhaps, by a physical barrier, but by embarrassing and onerous trade regulations.

**\*1130** . . . These outlets, east, west, and south, are indispensable to the well-being of the people inhabiting, and to inhabit, this vast interior region . . . . [These outlets] of right, belong to [the American] people, and to their successors forever. True to themselves, they will not ask where a line of separation shall be, but will vow, rather, that there shall be no such line. [\[FN59\]](#)

Like the Founders, Lincoln is obviously concerned here with militarily defensible borders, and the need to prevent the emergence of two powerful and hostile regimes side by side, generating an arms race or a trade war that might lead to the militarization or the impoverishment of the continent. From the Founding to 1860, the United States had flourished as a remarkable free-trade and demilitarized zone. Those who didn't like Union policies were free to leave, but they had no right to take the land with them, or to try to bind their pro-Union neighbors, whether many or few. All Americans had invested in Fort Sumter and had a stake in the Mississippi River, and no single state could unilaterally take its land or waters and go home. With these general geographic and geostrategic themes, Lincoln was following in a grand tradition of the Founders and his predecessor presidents. But if we listen closely, we can surely hear a Midwestern twang in his particular version of the geostrategic story--a version that highlights the role of the Midwest, that emphasizes the lack of natural and defensible borders within the heartland, that envisions the enormous demographic and economic potential of this basin, that respects the huge significance of the mighty Mississippi, and that appreciates how wrong it would be to give New Orleans an economic stranglehold over the entire region from the Appalachians to the Rockies. [\[FN60\]](#) So here, too, I suggest, Lincoln gave us Unionism with an Illinois accent.

#### IV. A Multiracial Union

There is in Lincoln's words a quasi-religious vision of the special bond between the American people and the American land. Garry Wills has beautifully explored the rich image of divine conception that Lincoln conjured up at Gettysburg when he spoke of how "our fathers" "brought forth" upon "this continent" a "new birth." [\[FN61\]](#) These remarks were made, of course, at an event commemorating the placement of Americans back into the land. Truly, what "brave [American] men, living and dead, . . . did here" made this "final resting place," in Lincoln's words, "hallow[\*1131 ed] . . . ground." [\[FN62\]](#) Also, Lincoln's words often featured a strongly religious vision of slavery as America's original sin, for which she must suffer divine retribution and seek divine redemption. Lincoln's Second Inaugural Address is a haunting expression of this vision. [\[FN63\]](#) It should not be surprising then, to find these two grand themes intermingling in Lincoln's Second Annual Message to Congress. Specifically, Lincoln suggested that America's special patrimony of rich land could be offered up--tithed, if you will--to help atone for slavery's ills. Slaves should be emancipated by the national government, but

masters would receive fair compensation, and the newly freed folk could then be sent, at government expense and with their consent, to some place outside the Union. To pay for all this, the government would simply need to sell off some of its bounteous land holdings in the heartland. "Our abundant room--our broad national homestead--is our ample resource." [\[FN64\]](#) Lincoln was quite in earnest here, piling up extensive statistics and projections to show how the plan was economically feasible.

Of course he soon came to chart another path. As a war measure, he issued the Emancipation Proclamation declaring freedom for slaves held in rebellious territories; blacks soon flocked to Union banners and formed a vital part of the Union Army; and ultimately the Thirteenth Amendment (signed by Lincoln, though his signature was strictly speaking unnecessary) provided for uncompensated emancipation, even in Union states. Gone was the idea of compensation for slave masters, and gone too, the dream of colonization of black folk beyond the Union. Lincoln came to realize at the end of his life what he had not seen earlier: blacks and whites could indeed live together-- could win a war together--under conditions of civil and political equality. [\[FN65\]](#) In a private letter probably penned in early 1864, Lincoln wrote:

How to better the condition of the colored race has long been a study which has attracted my serious and careful attention; hence I think I am clear and decided as to what course I shall pursue in the premises, regarding it a religious duty, as the nation's guardian of these people, who have so heroically vindicated their manhood on \*1132 the battle-field, where, in assisting to save the life of the Republic, they have demonstrated in blood their right to the ballot, which is but the humane protection of the flag they have so fearlessly defended. [\[FN66\]](#)

And in his last major address, delivered four days before his death, Lincoln went public with his new, more inclusive vision: "It is . . . unsatisfactory to some that the elective franchise is not given to the colored man. I would myself prefer that it were now conferred on the very intelligent, and on those who serve our cause as soldiers." [\[FN67\]](#)

This was an important transformation in Lincoln's view of the Union. For a Union aims to unite not just territory, or states, but also persons--flesh and blood human beings. Lincoln's early vision was of an ultimate Union that would largely be of, by, and for whites; after getting their freedom, blacks would be encouraged to move elsewhere--say, Africa or central America. But the experience of the Civil War itself, and the bravery exhibited by black soldiers, helped persuade Lincoln to embrace a more inclusive conception of Union, bringing together not merely different regions but also different races.

Once again, we can speculate about how Lincoln's experiences in this part of the country may have influenced his early views. For someone living in Maine or Vermont or Massachusetts--or even Minnesota or Wisconsin or Michigan, for that matter--the idea of a genuinely multiracial society with large numbers of blacks living amidst whites may have seemed somewhat abstract. But not for someone living in central Illinois, between the Ohio and the Mississippi. Black folk were all around. With Saint Louis on one side and Louisville on the other, the inhabitants of downstate Illinois were not merely north of Slavery, but also east and west of it, and even (in places like Cairo) south of it. Once slavery was abolished across the continent, the question of interracial relations among free blacks and whites would surface with obvious urgency in places like central Illinois. Lincoln's early thoughts on this issue reflected the racial bigotry and anxiety of his time and place.

Yet Lincoln was willing to rethink these views, to grow in office, and by the hour of his death to

embrace a far more inclusive view of a multiracial Union of equal citizens, black and white, North and South, East and West. Doubtless, even Lincoln's final vision had flaws and omissions--especially when judged by the standards of today. But it represented a remarkable advance over an original Constitution that had openly protected slavery. Thus, Lincoln did much more than preserve the Union; he also redefined it. In a much deeper way than ever before, the nation after and because of Lincoln became "dedicated to the proposition that all men [and women] are created equal." [\[FN68\]](#) In this \*1133 largest sense, all Americans, whether or not they dwell in this great state, are living in the land of Lincoln.

[\[FNd1\]](#). This address was delivered on October 26, 1999, at the University of Illinois College of Law as the Fall 1999 David C. Baum Memorial Lecture on Civil Rights and Civil Liberties.

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[\[FN1\]](#). Gettysburg Address (Nov. 19, 1863), in 7 *The Collected Works of Abraham Lincoln* 22, 23 (Roy P. Basler ed., 1953) [hereinafter *Collected Works*].

[\[FN2\]](#). Farewell Address at Springfield, Illinois (Feb. 11, 1861), in 4 *Collected Works*, supra note 1, at 190. Several versions of this address exist; my lecture quotes from the version written out by Lincoln as the train was leaving Springfield. The manuscript begins in Lincoln's handwriting, but concludes with that of his secretary, John G. Nicolay. Perhaps its most haunting phrase to modern readers (who know, as no one did that day, the rest of Lincoln's story)--"or whether ever, I may return"--are in Nicolay's hand. A version published in an Illinois paper on February 12, 1861, does contain the following: "With these few words, I must leave you--for how long I know not." *Id.* at 191. This newspaper version, with minor punctuation changes, appears on a plaque at Lincoln's tomb in Springfield.

[\[FN3\]](#). James Buchanan, Fourth Annual Message (Dec. 3, 1860), in *Great Presidential Decisions* 215, 228-29 (Richard B. Morris ed., 1966) [hereinafter *Buchanan's 1860 Message*].

[\[FN4\]](#). For a different reading of this address, stressing its tactical flexibility, see David M. Potter, *Lincoln and His Party in the Secession Crisis* 318-33 (1942).

[\[FN5\]](#). First Inaugural Address (Mar. 4, 1861), in 4 *Collected Works*, supra note 1, at 262, 265-70 [hereinafter *First Inaugural Address*].

[\[FN6\]](#). *Id.* at 264-65.

[FN7]. Buchanan's 1860 Message, *supra* note 3, at 221 (summarizing but rejecting this view).

[FN8]. First Inaugural Address, *supra* note 5, at 265.

[FN9]. [U.S. Const. art. V](#) ("[N]o State, without its Consent, shall be deprived of its equal Suffrage in the Senate."); see also Lincoln's Speech at Galena, Illinois (July 23, 1856), in 2 Collected Works, *supra* note 1, at 353, 355 ("We don't want to dissolve [the Union], and if you attempt it, we won't let you."); Letter of December 17, 1860, to Thurlow Weed, in 4 Collected Works, *supra* note 1, at 154 ("I believe you can pretend to find but little, if any thing, in my speeches, about secession; but my opinion is that no state can, in any way lawfully, get out of the Union, without the consent of the others...."). Read broadly, these statements might seem to insist that every state must agree to secession; read narrowly, they merely reject the idea that each state may unilaterally secede without the general (though not necessarily unanimous) consent of sister states and the American people as a whole.

[FN10]. First Inaugural Address, *supra* note 5, at 267-68.

[FN11]. Special Session Address (July 4, 1861), in 4 Collected Works, *supra* note 1, at 421, 426, 436-37, 439 [hereinafter Special Session Address]. For more discussion of the implications of Lincoln's allusion to the Union's "territorial integrity," see *infra* Part III. For more discussion of the implications of Lincoln's allusion to "succeeding elections," see *infra* text accompanying notes 22-27.

[FN12]. Gettysburg Address, in 7 Collected Works, *supra* note 1, at 23; see also Letter of January 11, 1861, to James T. Hale, in 4 Collected Works, *supra* note 1, at 172 ("We have just carried an election on principles fairly stated to the people. Now we are told in advance, the government shall be broken up, unless we surrender to those we have beaten, before we take the offices.... [I]f we surrender, it is the end of us, and of the government.").

[FN13]. First Inaugural Address, *supra* note 5, at 270.

[FN14]. For discussion, see 2 Bruce Ackerman, *We the People: Transformations* 128-29 (1998); Herman V. Ames, *The Proposed Amendments to the Constitution of the United States During the First Century of Its History* 293-94 (1897); Potter, *supra* note 4, at 101-11; Stephen Keogh, *Formal & Informal Constitutional Lawmaking in the United States in the Winter of 1860-1861*, 8 *J. Legal Hist.* 275, 280 (1987). Lincoln did not support Crittenden's call for a national referendum, but his reasons seem more substantive than procedural: he strongly disagreed with the specific compromises with slavery that Crittenden was seeking to enshrine in the Constitution.

[FN15]. See *Cong. Globe*, 36th Cong., 2d Sess. 237 (Jan. 3, 1861) (Remarks of Senator John Crittenden)

("I do hope that the representatives will respect and regard and give a proper influence to the sense of the people").

[FN16]. For a quick discussion, see Ronald D. Rotunda, The [Aftermath of Thornton, 13 Const. Comment. 201, 206-09 \(1996\)](#). See also George H. Haynes, The Election of Senators (1906); Vikram David Amar, The [People Made Me Do It: Can the People of the States Instruct and Coerce Their State Legislatures in the Article V Constitutional Amendment Process?](#), [41 Wm. & Mary L. Rev. 1037, 1068-71 \(2000\)](#). It's worth noting that the Lincoln-Douglas Senate race of 1858, in which the parties nominated U.S. Senate candidates before the statewide election of state legislators, with the senate candidates bringing their campaigns directly to the electorate, has been described as the "first important step toward the Seventeenth Amendment." Don E. Fehrenbacher, *Prelude to Greatness: Lincoln in the 1850s* 49 (1962). See generally Haynes, *supra*, at 99.

[FN17]. See, e.g., Special Session Address, *supra* note 11, at 440.

[FN18]. *Id.* at 437. Even in South Carolina, the consensus among "duly qualified voters" of course excluded black folk themselves from the conversation and the voting tally. The exclusion of both slaves and free blacks from Southern deliberations, and the pro-slavery rules of political apportionment within many Southern states--rules that gave more clout to districts with large slave populations--should remind us that we must be very careful not to automatically equate the views of politically dominant forces in the South with the views of "the South" itself. In most Southern states, blacks accounted for between a quarter and a half of the total population. If we count all the people within states, it becomes much harder to say that confederate governments really reflected the views of their respective state peoples. For more discussion, see Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, [65 Colo. L. Rev. 749 \(1994\)](#).

In addition, antebellum Southern governments criminalized antislavery speech, rendering suspect any claim that these governments were genuinely "democratic" by the standards of today or even by the standards of antebellum Northern states. See *infra* note 31.

[FN19]. But see [Geofroy v. Riggs, 133 U.S. 258, 267 \(1890\)](#) (dictum) (casting doubt upon the power of a treaty to cede state territory absent state consent).

[FN20]. But see *supra* note 18.

[FN21]. See U.S. Const. art. IV, § 3 ("[N]o new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress."); *id.* § 4 ("The United States... shall protect each of [the States] against Invasion....").

[FN22]. First Inaugural Address, *supra* note 5, at 264.

[FN23]. *Id.* at 270.

[FN24]. *Id.*

[FN25]. Special Session Address, *supra* note 11, at 439-40 (emphasis added); see also *supra* note 12.

[FN26]. For powerful reminders of the enormous importance of the very fact of a regular election in 1864, see Herman Belz, *Abraham Lincoln, Constitutionalism, and Equal Rights in the Civil War Era* 33-34 (1998); Phillip Shaw Paludan, *The Presidency of Abraham Lincoln* 290-92 (1994).

It is interesting to note that, between 1939 and 1945, America held three regular federal elections--two of them presidential elections. Lincoln's 1864 precedent made any deviation unthinkable, even in the midst of an all-out world war. In marked contrast, England held no general Parliamentary elections between November, 1935, and July, 1945. The general election scheduled for 1940 was postponed by amendments to the Septennial Act of 1716. As Churchill himself acknowledged to Commons in October, 1944, "[N]o one under thirty has ever cast a vote at a General Election, or even at a by-election, since the registers fell out of action at the beginning of the war." Winston S. Churchill, *Triumph and Tragedy* 586-87 (1953). For a rich discussion of the difference between fixed electoral timetables in America and the more fluid electoral timetables characteristic of parliamentary systems, see Bruce Ackerman, *The New Separation of Powers*, 113 *Harv. L. Rev.* 633 (2000).

[FN27]. Cf. Lincoln's Speech at White House Serenade (Nov. 10, 1864), in 8 *Collected Works*, *supra* note 1, at 100, 101:

We can not have free government without elections; and if the rebellion could force us to forego, or postpone a national election, it might fairly claim to have already conquered and ruined us.... [The election] has demonstrated that a people's government can sustain a national election, in the midst of a great civil war. Until now it has not been known to the world that this was a possibility.

These words, of course, came after electoral victory was his; but Lincoln had committed himself to a regular election long before he had any strong assurance that he would win. Indeed, in the late summer of 1864, Lincoln thought it "exceedingly probable" that he would be defeated by an administration that would likely undo his stance towards the Confederacy. In such an event, he deemed it his duty to preserve the Union as best he could until the end of his constitutional term, and thereafter surrender his office. See Lincoln's Secret Memorandum Concerning His Probable Failure of Re-election (Aug. 23, 1864), in 7 *Collected Works*, *supra* note 1, at 514.

[FN28]. Even if all the non-Lincoln votes had gone to a single opposition candidate, Lincoln would still have won a clear electoral college majority. See Fehrenbacher, *supra* note 16, at 160.

[FN29]. Id. at 114-20.

[FN30]. But see *supra* note 28.

[FN31]. This background helps explain the meaning of Lincoln's pointed suggestion in his First Inaugural that if Northern states should respect Southern rights by allowing the Article IV fugitive slave clause to be enforced, then presumably Southern states should likewise respect the Article IV "privileges" and "immunities" of Northern "citizens." Such immunities encompassed freedom of speech, press, petition, assembly, and worship in the minds of most Republican Party leaders; this ideology would eventually culminate in the language of the Fourteenth Amendment's privileges or immunities clause, designed to protect free speech and other fundamental rights against state abridgement. See generally Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* (1998), and the myriad works of Professor Michael Kent Curtis cited therein.

Another possible reason for the Slave Power's fear of Lincoln in 1861 was that Lincoln could, as President, appoint territorial governors who might try to enforce antislavery policies in the territories, thereby constricting slavery's expansion. Such policies might have faced tough sledding before the Taney Court, however. See [Dred Scott v. Sanford, 60 U.S. \(19 How.\) 393, 450 \(1857\)](#) (proclaiming antislavery laws in federal territories unconstitutional). Moreover, although Lincoln's anticipated territorial policies may have threatened slave owners' long-term interests, these policies did not pose any immediate threat to the Slave Power's dominant power base in the South.

[FN32]. See generally Jefferson Davis, *The Rise and Fall of the Confederate Government* (rev. ed. 1958).

[FN33]. See *infra* text accompanying note 50.

[FN34]. Special Session Address, *supra* note 11, at 433-35.

[FN35]. This brief sketch represents a composite of arguments I have elsewhere presented. See, e.g., Akhil Reed Amar, Of [Sovereignty and Federalism](#), 96 *Yale L.J.* 1425, 1442-62 (1987); Akhil Reed Amar, The [Consent of the Governed: Constitutional Amendment Outside Article V](#), 94 *Colum. L. Rev.* 457, 462-69 & n.37 (1994); Amar, *supra* note 31, at 5-6, 156-58.

[FN36]. U.S. Const. art. VI ("This Constitution... shall be the supreme Law of the Land... any thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

[FN37]. See *supra* text accompanying notes 6-7.

[FN38]. [U.S. Const. art. V](#) (stating that a constitutional amendment "shall be valid to all Intents and Purposes" if proposed by a properly convened convention or by two-thirds of each house of Congress and ratified by "the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof").

[FN39]. See [The Federalist No. 5](#), at 50 (John Jay) (Clinton Rossiter ed., 1961) (quoting letter of July 1, 1706, from Queen Anne to the Scotch Parliament); [An Act for rendering the Union of the Two Kingdoms more intire and complete](#), 1707, 6 Ann., 40 (Eng.).

[FN40]. 1 William Blackstone, [Commentaries n.e](#) (Oxford, 1766).

[FN41]. [The Federalist No. 5](#), at 50 (John Jay) (Clinton Rossiter ed., 1961) .

[FN42]. [Id. No. 11](#), at 91 (Alexander Hamilton) (emphasis added).

[FN43]. 2 [The Debates on the Adoption of the Federal Constitution](#) 463 (Jonathan Elliot ed., rev. ed. 1888) (emphasis added).

[FN44]. Letter of July 20, 1788, in 11 [The Papers of James Madison](#) 189 (Robert A. Rutland & Charles F. Hobson eds., 1977) (emphasis altered). Several of the quotations in this paragraph could be read to imply that even the national people should not be able to dissolve the Union, but the more natural reading in context is simply a rejection of the notion of unilateral state secession.

[FN45]. [First Inaugural Address](#), *supra* note 5, at 265.

[FN46]. [Buchanan's 1860 Message](#), *supra* note 3, at 221 (emphasis added).

[FN47]. See *infra* Part III.

[FN48]. Robert E. Lee came from what was perhaps Virginia's first family, tracing its roots back five generations to the arrival of Richard Lee from England in the first half of the seventeenth century. Both the general's father and grandfather had served in Virginia's House of Burgesses, as had a great many extended relations. See [Burton J. Hendrick, \*The Lees of Virginia, A Biography of a Family\*](#) 1, 48, 76, 97, 329 (1935).

[FN49]. Letter of December 20, 1859, to Jesse W. Fell, in 3 Collected Works, supra note 1, at 511.

[FN50]. First Inaugural Address, supra note 5, at 265.

[FN51]. Special Session Address, supra note 11, at 434.

[FN52]. Douglass Adair, *Fame and the Founding Fathers* 75-76 (Trevor Colbourn ed., 1974).

[FN53]. This paraphrase of Publius borrows from an earlier essay of mine, which attempts to present these ideas with far more elaboration and documentation. See Akhil Reed Amar, [Some New World Lessons for the Old World](#), 58 *U. Chi. L. Rev.* 483 (1991).

[FN54]. U.S. Const. art. I, § 10, para. 3 ("No State shall, without the Consent of Congress,... keep Troops, or Ships of War in time of Peace....").

[FN55]. Article I counterbalances state-influenced militias against a potential federal professional standing army; and both the Second and Third Amendments reflect concern about a potentially overweening federal army. For details, see Amar, supra note 31, at 46-63.

[FN56]. See supra note 36.

[FN57]. For details, see Amar, supra note 53.

[FN58]. First Inaugural Address, supra note 5, at 269; see also Lincoln's Second Annual Message to Congress (Dec. 1, 1862), in 5 Collected Works, supra note 1, at 518, 527-28 [hereinafter Second Annual Message].

[FN59]. Second Annual Message, supra note 58, at 527-29.

[FN60]. See also Lincoln's famous comment after Grant captured Vicksburg, thereby giving the Union control of the mighty Mississippi: "The Father of Waters again goes unvexed to the sea." Letter of August 26, 1863, to James C. Conkling, in 6 Collected Works, supra note 1, at 406, 409.

[FN61]. Garry Wills, *Inventing America* xv-xvi (1978); Garry Wills, *Lincoln at Gettysburg* 57, 77-79

(1992).

[FN62]. The Gettysburg Address, in 7 Collected Works, supra note 1, at 23.

[FN63]. The Almighty has His own purposes.

"Woe unto the world because of offenses! for it must needs be that offenses come; but woe to the man by whom the offense cometh!" If we shall suppose that American Slavery is one of those offenses which, in the providence of God, must needs come, but which, having continued through His appointed time, He now wills to remove, and that He gives to both North and South, this terrible war, as the woe due to those by whom the offense came, shall we discern therein any departure from those divine attributes which the believers in a living God always ascribe to Him? Fondly do we hope-- fervently do we pray--that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue, until all the wealth piled by the bond-man's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash, shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said "the judgments of the Lord, are true and righteous altogether."

Second Inaugural Address, in 8 Collected Works, supra note 1, at 333.

[FN64]. Second Annual Message, supra note 58, at 532.

[FN65]. See Eric Foner, Reconstruction 49, 74, 180, 183 (1988).

[FN66]. Letter to James S. Wadsworth (Jan. 1864), in 7 Collected Works, supra note 1, at 101.

[FN67]. Last Public Address (Apr. 11, 1865), in 8 Collected Works, supra note 1, at 399, 403.

[FN68]. Gettysburg Address, in 7 Collected Works, supra note 1, at 23.

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